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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN FIERRO, Defendant and Appellant.	F075500 (Super. Ct. No. VCF272573)
In re MARTIN FIERRO, On Habeas Corpus.	F076720 (Super. Ct. No. VCF272573) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In August 2012, appellant Martin Fierro was driving his vehicle in Visalia, California, when he fired a .22-caliber revolver at a bicycle rider. This appeared to be a random shooting. Appellant's single shot struck the rider in his chest. The rider lived, but he was hospitalized for five days.

In 2013, a jury convicted appellant of assault with a firearm (Pen. Code, § 245, subd. (a)(2);[1] count 2) and found true three special allegations: (1) that he committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(4)); (2) that he personally and intentionally discharged a firearm from a motor vehicle with the intent to inflict great bodily injury and did inflict great bodily injury (§ 12022.55); and (3) that he personally caused great bodily injury (§ 12022.7). The jury, however, could not reach a verdict on the other charge of premeditated attempted murder (§§ 664/187, subd. (a); count 1). A mistrial was declared regarding count 1, and the prosecution offered to dismiss it in exchange for a waiver of appellate rights. Appellant agreed. Appellant was sentenced to prison for 15 years to life.[2]

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[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] The life sentence of 15 years was triggered because of the true finding that appellant discharged the firearm from a motor vehicle intending to inflict (and inflicting) great bodily injury (§ 12022.55), coupled with the true finding that appellant committed this crime to benefit a criminal street gang (§ 186.22, subd. (b)(1)). (§ 186.22, subd. (b)(4)(B).)

However, despite his agreement, appellant appealed. He asserted his waiver had not been knowing and intelligent. He further argued that instructional error had occurred regarding the special allegation under section 12022.55. On May 18, 2016, this court issued an unpublished opinion (*People v. Fierro* (May 18, 2016, F068387), mod. upon denial of rehg. June 9, 2016), which addressed appellant's claims. We agreed that the record did not establish a knowing and intelligent waiver of appellate rights. We also agreed that instructional error had occurred regarding the special allegation under section 12022.55. We vacated the jury's true finding and remanded the matter for resentencing. However, because of the defective waiver of appellate rights, we also gave the prosecution the option to reinstate the attempted murder charge in count 1 and to reinstate the sentence enhancement under section 12022.55 in count 2. The trial court was directed to conduct further proceedings as appropriate. (*People v. Fierro, supra,* F068387.)

Upon remand, the prosecution reinstated the attempted murder charge in count 1, but it did not pursue the sentence enhancement in count 2. Appellant filed a *Marsden*[3] motion, which was denied. A second trial commenced, and the jury convicted appellant of attempted murder (§§ 664/187, subd. (a); count 1), but it did not find premeditation and deliberation. The jury found true that appellant personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)).

The court sentenced appellant to the upper term of nine years for the attempted murder, plus a consecutive indeterminate term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The sentence on count 2 was stayed pursuant to section 654.

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3 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The same defense counsel represented appellant in both trials.

Appellant filed the present appeal and a petition for a writ of habeas corpus, which we consolidated. Appellant raises numerous issues in the consolidated matter, including ineffective assistance of counsel, instructional and evidentiary errors, an improper denial of his *Marsden* motion, various alleged constitutional violations, and a request for remand so the trial court may exercise its new sentencing discretion regarding the firearm enhancement. We reject all of appellant's claims. We deny remand because the sentencing record conclusively establishes that the court would not have exercised its discretion to strike or dismiss the firearm enhancement. Our independent review of the record, however, has revealed clerical errors in the indeterminate abstract of judgment. We will direct the trial court to amend the indeterminate abstract of judgment, but we will otherwise affirm the judgment. We will deny the petition for a writ of habeas corpus.

BACKGROUND

We summarize the material evidence from the second trial. We discuss additional trial facts later in this opinion when relevant to specific issues.

I. The Shooting.

On August 31, 2012, G.A. was riding a bicycle on a public street in Visalia, California, when he was shot in his chest. G.A. did not see his assailant. He was transported to the hospital and underwent surgery. He was hospitalized for five days. The bullet was not removed, and it remained lodged in his body.

About 10 minutes after this shooting, and about three to four miles away, police officers spotted appellant driving a vehicle that matched a description given by dispatch. The officers initiated a traffic stop, and appellant was taken into custody. A .22-caliber revolver was recovered from appellant's vehicle. Appellant's firearm held five live rounds, and it had three spent casings.

II. Appellant's Interview With A Detective.

A detective interviewed appellant, which was recorded and played for the jury. During the interview, the detective said he knew appellant had experienced "hard times" recently and he asked if appellant's home had been "recently firebombed or shot at like last week?" Appellant agreed. The detective asked if appellant associated with Sureños, which appellant denied. However, appellant admitted associating with "Northerners." The detective asked appellant, "did [G.A.] just fucking … mad dog you or did he call a—some fucking derogatory name? Buster, something like that, trying to piss you off a little bit, cause you to react in the way you did?" Appellant said, "I don't know." Appellant denied knowing G.A.

The detective asked if appellant was "just pissed off at the world" and wanted to get his aggression out on someone. Appellant said that "shootings" had occurred at his residence "and stuff like that so I was just—I don't know." The detective said that he would be upset if someone had shot at his house or threw "firebombs" and appellant had every right to be angry.

Appellant indicated that he had recently acquired the gun that law enforcement had recovered. He said he was driving his vehicle alone. He said he did not know G.A. and he did not know if he had ever seen G.A. before. When asked if he shot G.A. because appellant might have thought he was the one who firebombed his house, appellant answered, "Dunno. Maybe. I don't know."

Appellant admitted firing one shot at G.A. using the revolver recovered from his vehicle. Appellant said that G.A. had been on a bike to the left of his vehicle. He denied saying anything to G.A. before shooting him. He said, "I don't know" when asked what had been going through his head. Appellant denied that G.A. had been armed, and he denied that G.A. came at him with anything. He said he did not see his shot hit G.A. The detective noted that appellant's revolver had three spent casings, and appellant said he did

not know where or when the other two bullets had been fired. He denied that they had been fired that day.

The detective again asked appellant to explain why he had shot G.A. Appellant again denied knowing G.A., but he said "I just thought he could've been somebody. I don't know." The detective asked if appellant had "heard on the streets" who had "firebombed" and shot at his house. The detective asked if appellant thought G.A. had been responsible. Appellant answered, "I don't know. Maybe." The detective asked appellant to confirm that he was the person responsible for firing one round and striking G.A. Appellant indicated that was true. He said "No" when asked if he wanted to say anything else in his defense.

III. The Relevant Trial Evidence.

At trial, the prosecution presented nine witnesses. G.A. denied knowing or recognizing appellant. He did not know why he had been shot. Defense counsel only cross-examined one of the prosecution's witnesses, a police officer who investigated this shooting. Appellant did not testify during the second trial and the defense presented no evidence.

DISCUSSION

I. We Grant In Part And Deny In Part Appellant's Request For Judicial Notice; We Grant Respondent's Request For Judicial Notice.

Pursuant to rule 8.252 of the California Rules of Court, and Evidence Code sections 452 and 459, both parties have filed requests that we take judicial notice of our records in appellant's prior appeal (case No. F068387), along with our prior opinion in *People v. Fierro, supra*, F068387. In addition, respondent requests that we take judicial notice of our records in appellant's present appeal (case No. F075500). We grant these requests for judicial notice and we take notice of our records appearing in appellate case

numbers F068387 and F075500, including our prior opinion. (Evid. Code, § 452, subd. (d).)

Appellant also requests that we take judicial notice of his petition for a writ of habeas corpus (case No. F076720). Respondent objects, contending that the facts and propositions contained in the petition are disputed. We agree. We will not take judicial notice of the facts and propositions contained in appellant's petition because they are reasonably subject to dispute. (Evid. Code, § 452, subd. (h).) We deny appellant's request for judicial notice in that regard.

II. Double Jeopardy Principles Did Not Bar Retrial.

Appellant contends that double jeopardy principles barred retrial of the attempted murder charge (count 1). He asserts that his attempted murder conviction must be reversed with prejudice and his matter remanded for resentencing.

A. The jury's deliberations during the first trial.

The jury in the first trial began deliberations in the afternoon on August 23, 2013. Deliberations resumed on August 26, 2013. That afternoon, the jury sent a written question to the trial court, indicating it could not agree on a verdict for attempted murder (count 1) but it was "unanimous" on assault with a firearm (count 2). The jury indicated its belief that it was not allowed to find appellant guilty on both counts, and it asked the court how the two counts impacted its inability to reach a unanimous decision. The trial court responded[4] in writing and directed the jury to review CALCRIM No. 3518, which advises a jury that, if it finds a defendant not guilty of a greater charged crime, it may find him or her guilty of a lesser crime. The court directed the jury to report if it could not reach an agreement on attempted murder (count 1). The jury resumed deliberations that afternoon.

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[4] A different superior court judge responded to the jury's written question because the trial judge was absent that day.

The following day, August 27, 2013, the trial court and the attorneys realized that instructional error had occurred because the jury had been improperly told that counts 1 and 2 were alternative charges (CALCRIM No. 3516). With the attorneys' approval, the court stated it would inform the jury about the error, and it would instruct the jury that the multiple counts were separate charges, and both required consideration (see CALCRIM No. 3515).

A minute order reflects that, on August 27, 2013, at 10:44 a.m., the trial judge entered the jury room. The substance of the judge's interactions with the jury does not appear in this record. At 11:07 a.m. that same morning, the jury informed the bailiff that it had reached a verdict.

In open court, the foreperson announced that the jury had reached a verdict on count 2 but not on count 1. The trial court asked if the foreperson thought further deliberations would result in a verdict on count 1. The foreperson answered, "I don't think so, your Honor." The court made the following statement: "Any of the jurors think that further deliberations would result in a verdict on Count 1? I see no one saying yes. Okay. So if you want to hand all the verdict forms to the bailiff. Then as to Count 1, the Court will declare a mistrial on that matter."

B. The standard of review.

An abuse of discretion standard is used to review a trial court's decision to declare a mistrial. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 426; *People v. Rojas* (1975) 15 Cal.3d 540, 546 (*Rojas*).) Under this standard, we will not disturb the trial court's decision on appeal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse of discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)

C. Analysis.

Appellant argues that the trial court failed to determine or explain the need for a mistrial. He contends that the jury had not engaged in lengthy deliberations, it was not exhausted, and it never indicated that a "genuine deadlock" existed. He also asserts that, because of the instructional error involving the alternative counts, it appears the jury had decided he was not guilty of attempted murder. He maintains the protections afforded by double jeopardy barred retrial on count 1, and his attempted murder conviction must be reversed. We disagree. The trial court did not abuse its discretion in declaring a mistrial.[5]

1. The "law of the case" doctrine is inapplicable.

As an initial matter, respondent contends that, based on this court's prior opinion, the "law of the case" doctrine permitted appellant's retrial. We disagree that the "law of the case" doctrine is pertinent in this situation. This doctrine applies when an appellate court has stated a rule of law necessary to its decision. (*People v. Alexander* (2010) 49 Cal.4th 846, 870.) That principle or rule of law must be adhered to throughout its subsequent proceedings, both in the lower court and in any subsequent appeal. (*Ibid.*)

Our prior opinion neither analyzed nor addressed whether the attempted murder charge (count 1) could be retried. To the contrary, we remanded this matter for resentencing. Although we gave the prosecution the option to reinstate the charges in count 1, we did not declare that the prosecution could, as a matter of law, retry the matter. Instead, we directed the trial court to "conduct further proceedings as may be appropriate." (*People v. Fierro, supra,* F068387.)

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[5] Respondent asserts that appellant has forfeited the present claim based on a failure to raise it at the outset of the second trial. To overcome forfeiture, appellant alleges ineffective assistance of counsel. We need not address these disputed issues. Instead, even without forfeiture, this claim fails on its merits.

Our prior opinion did not state a principle or rule of law regarding whether the attempted murder charge (count 1) could be retried. As such, the "law of the case" doctrine does not apply. (See *People v. Alexander, supra,* 49 Cal.4th at p. 870.) Accordingly, we reject respondent's argument that this doctrine precludes appellant's present double jeopardy challenge. However, as we discuss below, appellant's claim otherwise fails on its merits.

2. The trial court did not abuse its discretion in declaring a mistrial.

To support his arguments, appellant cites numerous federal opinions, most of which are from lower courts. These opinions set forth various factors a district court should consider when determining whether a jury is deadlocked. Appellant's federal authorities do not assist him.

As an initial matter, California courts are not bound by decisions of the lower federal courts, even on questions of federal law. (*People v. Avena* (1996) 13 Cal.4th 394, 431.) In any event, both federal and California law permit the retrial of a criminal defendant when a jury is discharged due to the inability to agree on a verdict. (*Richardson v. United States* (1984) 468 U.S. 317, 323–324; *People v. Anderson* (2009) 47 Cal.4th 92, 104.) Under both the federal and state Constitutions, a person may not be twice placed in jeopardy for the same offense. (*People v. Halvorsen, supra,* 42 Cal.4th at p. 425.) Under federal terminology, a " 'manifest' " necessity is required to discharge a jury, while California uses the term " 'legal' " necessity. (*Ibid.*) A deadlocked jury constitutes the required necessity to declare a mistrial and retry a defendant. (*Ibid.*)

In California, sections 1140 and 1141 codify this principle. These statutes prohibit discharge of a jury after the case is submitted to it unless it has rendered a verdict, the parties consent to discharge, or it appears there is no reasonable probability the jury can agree. (*People v. Halvorsen, supra,* 42 Cal.4th at p. 425.) When a trial involves multiple

counts, a trial court may receive a verdict on one count and discharge a deadlocked jury regarding another count without jeopardy attaching to that charge. (*People v. Anderson, supra,* 47 Cal.4th at pp. 104–105.)

In *Paulson v. Superior Court of El Dorado County* (1962) 58 Cal.2d 1, our high court stated that a trial judge should ordinarily not declare a mistrial without first questioning the jurors individually to determine if there is no reasonable probability that the jury can agree on a verdict. (*Id.* at p. 7.) However, reviewing courts have not required the trial court to individually question the jurors before declaring a mistrial if the record otherwise establishes the jury's inability to agree. Three opinions are instructive.

First, in *Rojas, supra,* 15 Cal.3d 540, the jury deliberated for about five and a half hours before the trial judge asked the foreperson whether it had reached a verdict, and if not, to provide the vote count. The foreperson said no verdict had been reached and the count was nine to three. The court asked whether she felt further deliberations would be of value, and she replied that she did not. "The court then asked: 'Does anybody on the jury think so?' " The record indicated that various jurors "shook their heads negatively." (*Id.* at p. 546.) Our high court concluded that, under these circumstances, the trial court did not abuse its discretion in discharging the jury. To the contrary, the court "properly determined that there was no reasonable probability that a verdict could be reached." (*Ibid.*)

Second, in *In re Chapman* (1976) 64 Cal.App.3d 806 (*Chapman*), the jury deliberated for almost 90 minutes following a trial that lasted less than three hours, including argument and instruction. (*Id.* at p. 816.) The trial judge asked the foreperson on two separate occasions, and the jury once as a group, if they felt further deliberations would be helpful. The court received negative responses. Although the record did not reflect that the jurors shook their heads, that could be inferred when the court asked the

other jurors if they felt the same way. (*Id.* at p. 817.) The appellate court found no abuse of discretion. (*Ibid.*)

Third, in *People v. Smith* (1970) 13 Cal.App.3d 897, the trial court declared a mistrial after only speaking with the jury foreperson and without polling the individual jurors. (*Id.* at p. 910.) However, the jury was in open court when the foreperson indicated that the jury was deadlocked. When asked if the jury wished to deliberate further, the foreperson replied in the negative. The court declared a mistrial and excused the jury. The appellate court concluded "there was adequate compliance with the requirement that the trial judge probe the rigidity of the deadlock before discharging the jury." (*Id.* at p. 911.)

In this matter, and similar to *Rojas*, *Chapman* and *Smith*, the circumstances demonstrate that the court made sufficient inquiry to determine that the jury was deadlocked. During the second day of deliberations, the foreperson indicated in writing that the jury was unable to reach a verdict on count 1. The trial court responded, and the jury continued deliberations. The following day, the jury indicated it had reached a verdict. In open court, the foreperson announced that the jury had reached a verdict on count 2 but not on count 1. The court asked if the foreperson thought further deliberations would result in a verdict on count 1. The foreperson answered, "I don't think so, your Honor." The court asked the jurors as a group if they thought further deliberations would result in a verdict. No jurors responded, and the court declared a mistrial. The circumstances overwhelmingly suggest that there was no reasonable probability a verdict could be reached in count 1. As such, jeopardy did not attach to the attempted murder charge, and appellant's second trial was proper. (See *People v. Anderson, supra,* 47 Cal.4th at pp. 104–105.)

Finally, we reject appellant's suggestion that instructional error precluded his retrial. To the contrary, the trial court met with the jury and clarified that the two counts

were not charged in the alternative. Although the jurors announced that they had reached a verdict very shortly after the judge met with them, neither the foreperson nor any of the jurors expressed a belief that the two counts were alternative charges. Instead, the foreperson's comments in court made it clear that the jury understood it was obligated to reach a verdict on count 1 if it could do so. The jury, however, expressed its inability to reach a verdict on attempted murder. Contrary to appellant's suggestion, this record does not establish that the first jury had determined that appellant was not guilty of the attempted murder charge.

Based on this record, the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Rodrigues*, *supra,* 8 Cal.4th at pp. 1124–1125.) The court's ruling was not outside the bounds of reason under applicable law and relevant facts. (See *People v. Williams*, *supra,* 17 Cal.4th at p. 162.) As such, the court did not abuse its discretion in declaring a mistrial on count 1 for attempted murder. (See *People v. Rojas*, *supra*, 15 Cal.3d at p. 546; *In re Chapman*, *supra,* 64 Cal.App.3d at p. 817.) Accordingly, double jeopardy principles did not bar retrial of count 1 and this claim fails.

III. Appellant's Due Process Rights Were Not Violated During The Second Trial.

Appellant argues that his due process rights were violated. He contends the prosecution was "vindictive" against him after he exercised his appellate rights. He asserts his judgment must be reversed.

A. The standard of review.

"The constitutional protection against prosecutorial vindictiveness is based on the fundamental notion that it 'would be patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' " (*In re Bower* (1985) 38 Cal.3d 865, 873, quoting *United States v. Jackson* (1968) 390 U.S. 570, 581.) The People bear the burden to rebut a presumption that the prosecution was vindictive

when it increases charges immediately following a defendant's exercise of his or her constitutional rights. (*In re Bower*, *supra*, 38 Cal.3d at p. 873.)

B. Analysis.

Appellant claims that, following his first trial, both the prosecutor and the trial court "had been content" with a sentence of 15 years to life. He notes that, after he was convicted of attempted murder, the prosecutor sought and obtained an aggravated prison term which was significantly higher than his prior sentence. He maintains that the prosecutor, his defense counsel, and the trial court all acted like his appeal had been a mistake. He contends that his second trial was "rushed" and it had a "zero chance" of success. He argues that he was punished because he exercised his right to appeal, and he asserts his judgment must be reversed. He relies primarily upon *North Carolina v. Pearce* (1969) 395 U.S. 711 (*Pearce*) and related authorities. Appellant's numerous assertions are without merit.

In *Pearce*, the United States Supreme Court held that the due process clause protects a defendant from both actual vindictiveness and the apprehension of retaliation for exercising the right to appeal. (*Pearce, supra,* 395 U.S. at p. 725.) The high court held that, on retrial after a successful appeal, a defendant may not receive a greater sentence than one initially imposed unless the increased sentence is supported by objective information about the defendant's conduct. (*Id*. at p. 726.)

The California Supreme Court has held that increased charges motivated by prosecutorial vindictiveness is prohibited by the due process clause in the California Constitution. (*In re Bower, supra,* 38 Cal.3d at p. 876.) A defendant is protected against both an actual vindictive prosecution and the apprehension of retaliation for exercising the right to appeal. (*Id.* at p. 873.) "[A]n inference of vindictive prosecution is raised if, upon retrial after a successful appeal, the prosecution increases the charges so that the

defendant faces a sentence potentially more severe than the sentence he or she faced at the first trial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 731.)

The record in this matter does not establish or even reasonably suggest that appellant underwent a vindictive second trial. The prosecutor neither increased the charges nor sought an increased sentence for a prior conviction. Instead, appellant was retried on the attempted murder count from the first trial. A second trial following a hung jury does not suggest a vindictive prosecution. (*People v. Villanueva* (2011) 196 Cal.App.4th 411, 419.)

Moreover, during the second trial, the prosecutor did not pursue an alleged gang enhancement in count 1 (§ 186.22, subd. (b)(5)). In addition, although this court's prior opinion permitted it to do so, the prosecutor did not retry the alleged firearm enhancement (§ 12022.55) in count 2. (*People v. Fierro, supra,* F068387.) The facts do not demonstrate a vindictive second trial.

Based on this record, the prosecution did not engage in constitutionally prohibited "vindictiveness" against appellant. (*Pearce, supra,* 395 U.S. at p. 725; see *People v. Villanueva, supra,* 196 Cal.App.4th at p. 419.) Accordingly, we reject appellant's due process arguments and this claim fails.

IV. The Trial Court Did Not Err In Failing To Instruct The Second Jury About The First Trial And Appellant's Trial Counsel Did Not Render Ineffective Assistance In Failing To Request An Instruction.

Appellant asserts that the trial court erred in failing to instruct the second jury about his prior conviction for assault with a firearm. In addition, he contends his trial counsel rendered ineffective assistance in failing to request such an instruction.

A. Background.

1. The jury instruction conference.

During the second trial, the court indicated that attempted voluntary manslaughter was the only lesser included offense to the attempted murder charge. Appellant's trial

counsel said he was not asking for such an instruction, but he wanted an instruction on assault with a firearm (which the first jury had rendered a guilty verdict in count 2) or simple assault. The court determined that substantial evidence only warranted the jury's consideration of attempted voluntary manslaughter.[6] The court noted that, during appellant's interview with the detective, the detective had mentioned recent shootings and a firebombing of appellant's house. According to the court, appellant had provided answers to the detective which suggested he may have shot G.A. because he was upset from those recent events.

2. The instructions given to the jury.

The trial court instructed the jury on attempted murder and the lesser included offense of attempted voluntary manslaughter. The jury was told, in part, that a "heat of passion" was present if appellant attempted to kill because he was provoked, the provocation "would have caused an ordinary person of average disposition to act rashly and without due deliberation," and the attempted killing "was a rash act done under the influence of intense emotion" that obscured appellant's "reasoning or judgment."

3. The closing arguments.

During closing argument, the prosecutor asserted that appellant was guilty of attempted premeditated murder because he intended to kill G.A. The prosecutor argued that appellant deliberately shot him.

During defense argument, appellant's trial counsel conceded that appellant had "broken several laws." Defense counsel said appellant had been driving with an illegal weapon, he had an open container of alcohol in his vehicle, he had committed an assault

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6 Assault with a deadly weapon is not a lesser included offense of attempted murder but represents a lesser related offense. (*People v. Nelson* (2011) 51 Cal.4th 198, 215.) A trial court is obligated to instruct sua sponte on lesser included offenses but not on lesser related offenses. (*People v. Taylor* (2010) 48 Cal.4th 574, 622.)

with a firearm, and he had caused great bodily injury. Defense counsel, however, asserted that those crimes were not before the jury. He argued that the evidence did not establish appellant's intent to commit murder.

Appellant's trial counsel argued that appellant only fired in G.A.'s direction and he did not purposefully aim his gun. Counsel also suggested that appellant may have fired at G.A. because of "shootings and firebombings" that had occurred at appellant's house. "Obviously, [appellant] thought that [G.A.] was somehow involved." Defense counsel said appellant had engaged in street justice, which was inappropriate, but "people had been coming to his home, and he wanted to discourage that. He wanted to show them that he wasn't supposed to be a victim; that his sister, that his nephew, that his family, shouldn't be shot at. They shouldn't be fired upon. That's why this case happened."

Defense counsel asserted that attempted murder did not occur just because appellant fired a gun at G.A. Counsel noted that appellant had fired a "low-caliber" revolver, which had held five more bullets. Counsel reminded the jury that a larger .40-caliber firearm, such as the type used by a police officer, was not always fatal. Counsel asserted that the evidence did not demonstrate appellant's intent to kill, and counsel emphasized that appellant could have fired five more times but did not do so.

In the alternative, defense counsel stated that, if the jury was going to convict, then attempted manslaughter was appropriate. Counsel reminded the jury about appellant's interview with the detective. The detective had indicated that he would also be angry if someone had fired at his house. Counsel asked the jury to review the interview and examine appellant's demeanor. According to counsel, provocation existed to support attempted voluntary manslaughter.

Finally, defense counsel asserted that more than one reasonable interpretation could be drawn from appellant's act of firing at G.A. He argued appellant may have

intended to scare G.A. or only injure him. Because it was only a "possibility" that appellant intended to kill, the jury should find appellant not guilty of attempted murder. Counsel told the jury that he was not asking them to believe that appellant was "a good guy" or to condone his actions. He was not stating it was okay to shoot people. Instead, the question was whether proof existed beyond a reasonable doubt that appellant had held an intent to kill. Counsel said such proof did not exist.

B. The standard of review.

Under the federal and state Constitutions, a criminal defendant is entitled to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel on direct appeal, a defendant must establish two criteria: (1) that counsel's performance fell below an objective standard of reasonable competence and (2) that he was thereby prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The defendant has the burden of showing both deficient performance and resulting prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) In conducting this review, the appellate court considers whether the record contains any explanation for counsel's actions; if the record sheds no light on counsel's actions, the claim is not cognizable unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation for the actions taken. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Likewise, a habeas corpus petitioner must prove facts by a preponderance of the evidence that establish a basis for relief. A petitioner must establish either (1) that, because of defense counsel's performance, "the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel's performance fell below an objective standard of reasonableness under prevailing

professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]" (*In re Visciotti* (1996) 14 Cal.4th 325, 351–352.)

C. Analysis.

After appellant filed his opening brief in this matter, our Supreme Court issued *People v. Hicks* (2017) 4 Cal.5th 203 (*Hicks*). In *Hicks*, the defendant was retried for second degree murder after a previous jury had failed to reach a verdict on that charge but convicted him of gross vehicular manslaughter while intoxicated, along with other offenses. (*Id.* at p. 205.) The *Hicks* court addressed whether a subsequent jury should be informed of a defendant's specific convictions resulting from a previous trial when the first jury fails to reach a verdict. (*Id.* at p. 205.) *Hicks* held that a trial court errs if it informs the new jury of prior specific convictions. (*Ibid.*) However, a trial court may instruct "the retrial jury along the following lines: 'Sometimes cases are tried in segments. The only question in this segment of the proceedings is whether the prosecution has proved the charge of murder. In deciding this question, you must not let the issue of punishment enter into your deliberations. Nor are you to speculate about whether the defendant may have been, or may be, held criminally responsible for his conduct in some other segment of the proceedings.' " (*Ibid.*) Such an instruction "need only be given upon request, would prevent the jury from wrongly assuming that an acquittal on the murder charge would result in the defendant escaping criminal liability altogether, and it would do so without introducing matters that are extraneous to the retrial." (*Id.* at pp. 205–206.)

Despite *Hicks*, appellant contends that his trial counsel was ineffective in failing to request "an appropriate jury instruction" to alleviate concern that the second jury would want to convict him instead of allowing him to go free. He acknowledges that his trial occurred before *Hicks* was published, but he argues a reasonably competent defense

attorney would have relied upon pre-*Hicks* opinions to pursue some type of jury instruction regarding the history of the prosecution. He asserts it is reasonably probable the result would have been different had the second jury received some type of admonition regarding the procedural history of the matter. He maintains his due process rights were violated, claiming he did not receive a fair trial. We disagree.

As an initial matter, *Hicks* makes it clear that the trial court did not err in failing to inform the second jury about appellant's prior conviction. (*Hicks, supra,* 4 Cal.5th at p. 205.) *Hicks* has disapproved the appellate opinions which appellant primarily relied upon in his opening brief, *People v. Batchelor* (2014) 229 Cal.App.4th 1102, and *People v. Johnson* (2016) 6 Cal.App.5th 505.[7] (*Hicks, supra,* 4 Cal.5th at p. 214, fn. 3.)

As we explain below, appellant fails to demonstrate ineffective assistance of counsel stemming from his counsel's failure to request some type of instruction. In any event, we also determine that, even if ineffective assistance occurred, any presumed error was harmless.

1. Appellant does not establish ineffective assistance of counsel.

Appellant suggests that a defense attorney in this situation *must* request some type of instruction to inform the jury about the history of the prosecution. He asserts that his counsel's failure to act forced the jury into an "all-or-nothing choice" that led to his conviction of attempted murder. He further contends that his counsel had a "nonchalant

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[7] In *People v. Batchelor*, the appellate court held that the trial court had "erred by instructing defendant's second jury in a manner that gave the jury the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder." (*People v. Batchelor, supra,* 229 Cal.App.4th at p. 1117.) Similarly, in *People v. Johnson*, the appellate court found error when the trial court failed to inform a second jury that appellant had been convicted in a prior trial arising out of the same underlying facts of gross vehicular manslaughter while intoxicated. (*People v. Johnson, supra,* 6 Cal.App.5th at p. 509.)

and defeatist attitude," and he claims that his counsel had no tactical justification for his failure to act. These assertions are without merit.

Appellant's trial counsel attempted to present various options to the jury. For instance, counsel asked the court to instruct the jury on assault with a firearm and simple assault. It is clear that appellant's trial counsel hoped to give the second jury the same options which were presented to the first jury, and which produced a favorable outcome for appellant in the form of a hung jury on the attempted murder charge. The court, however, refused to provide instructions regarding assault, which were not lesser included offenses to the pending charge of attempted murder. (*People v. Nelson, supra,* 51 Cal.4th at p. 215.)

During closing summation, defense counsel vigorously argued that the facts did not establish appellant's intent to kill. Appellant's trial counsel conceded that appellant committed an assault with a firearm, and he acknowledged that appellant's actions were deplorable. However, he emphasized that appellant only fired a small caliber revolver one time, and he could have fired his weapon up to five more times but did not do so. He asserted that appellant fired at G.A. to discourage any more shootings at his residence. Defense counsel argued that appellant must have believed that G.A. was involved in the prior incidents at appellant's home. Counsel noted that, if the jurors believed that appellant had held an intent to kill, then attempted voluntary manslaughter was a more appropriate verdict than attempted murder.

Finally, appellant's trial counsel may have rationally determined it was better to proceed without alerting the jury that a prior trial had occurred. Defense counsel may have reasonably believed that alerting the jury about a prior conviction against appellant stemming from the same facts might improperly color the jury against appellant. Indeed, in a different context our Supreme Court has held that a reasonable attorney may tactically conclude that the risk of a limiting instruction regarding gangs outweighs the

questionable benefits it would provide. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053.) The same logic applies here.

Based on this record, we cannot state that appellant's trial counsel had no rational tactical purpose for his failure to seek a jury instruction regarding the procedural history of this prosecution. Further, appellant has failed to demonstrate by a preponderance of the evidence (1) that the prosecution's case was not subjected to meaningful adversarial testing or (2) that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (See *In re Visciotti, supra,* 14 Cal.4th at pp. 351–352.) Accordingly, appellant does not establish ineffective assistance of counsel either on direct appeal or in his petition, and this claim fails. In any event, we also determine that any presumed error was harmless.

2. Appellant does not establish prejudice.

To establish prejudice on direct appeal, a defendant must demonstrate a " 'reasonable probability' " that, absent defense counsel's alleged errors, the result would have been different. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Majors* (1998) 18 Cal.4th 385, 403.) It is not sufficient to show the alleged errors may have had " 'some conceivable effect' " on the trial's outcome. (*People v. Ledesma, supra,* 43 Cal.3d at p. 217.) To the contrary, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citations.]" (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369.)

In a petition for a writ of habeas corpus, a petitioner "must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. [Citation.] 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied on as having produced a just result.' [Citation.]" (*In re Visciotti, supra,* 14 Cal.4th at p. 352.)

Here, we reject appellant's contention that the jury in the second trial was given an "all or nothing" choice. Instead, the jury was instructed on both attempted murder and attempted voluntary manslaughter. If the jury had believed it was warranted, it could have rejected the charge of attempted murder but still held appellant accountable for this shooting. The jury, however, did not do so.

Appellant intentionally fired a gun at G.A. This was an unprovoked shooting. G.A. did not know appellant or recognize him. Although appellant fired a weapon with a relatively small caliber, and he fired from a moving vehicle, appellant's shot was capable of inflicting a fatal wound. Although appellant could have fired more bullets, his single shot struck G.A. in his chest. The circumstantial evidence overwhelmingly suggests that appellant purposefully aimed at G.A.'s torso when he fired. From these facts, a strong inference exists that appellant intended to kill G.A. The jury was justified in convicting him of attempted murder.

Based on this record, it is not reasonably probable that, absent defense counsel's omissions, the result would have been different. (See *People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) Confidence in the outcome of this trial is not undermined. (See *People v. Majors, supra,* 18 Cal.4th at p. 403.) Further, defense counsel's alleged errors were not so serious as to deprive appellant of a fair trial. (See *Lockhart v. Fretwell, supra,* 506 U.S. at p. 369.) Finally, appellant has not established that his counsel's performance undermined the proper function of the adversarial process. (See *In re Visciotti, supra,* 14 Cal.4th at p. 352.) Accordingly, appellant has not established prejudice on either direct appeal or in his petition, and this claim fails.

V. The Trial Court Did Not Abuse Its Discretion In Limiting The Testimony Of Two Defense Witnesses.

Appellant asserts that the trial court prejudicially erred in limiting the testimony of two defense witnesses. He contends his judgment must be reversed.

A. Background.

1. The relevant trial testimony from the first trial.

During the first trial, appellant called several witnesses to testify, including his sister and her then fiancé, Mark Guajardo, Sr. Some of this testimony is relevant to the present claim.

Guajardo told the first jury that he and appellant's sister lived with appellant (along with other individuals). In August 2012, someone had fired a gun at their residence. Guajardo had been present when the shooting occurred. He had heard "popping" sounds and he told everyone to get down. On a later date, "Molotov cocktails" had been thrown at appellant's vehicle, which had been parked in front of the house. Guajardo had not been present when the Molotov cocktails were thrown at appellant's vehicle. During the first trial, Guajardo had agreed that appellant had seemed angry after the shooting incident.[8]

During the first trial, appellant's sister did not discuss the prior shooting and firebombing at her residence. Instead, she denied that appellant ever wore gang clothing, listened to gang music, or had a reputation for being a gang member. She said she would not have allowed appellant to live with her if she believed he had any ties to gangs.

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[8] In raising the present claim, appellant does not contend that he was present when the prior shooting and "firebombing" occurred at his residence. Guajardo's son (appellant's nephew) also testified during the first trial. He said he was home when he saw "a couple of kids running down the street" and they "threw some little firebombs" at appellant's vehicle.

2. The offer of proof during the second trial.

During the second trial, appellant wanted to call his sister and Guajardo to testify.[9] The prosecutor objected. Defense counsel made an offer of proof that these two witnesses could provide some background regarding the prior shooting and "firebombing" that had occurred at appellant's residence. Defense counsel also asserted that these witnesses would testify about appellant's character for nonviolence. According to defense counsel, the prior shooting at appellant's residence occurred "two to three months" prior to appellant's arrest for G.A.'s shooting. The firebombing had occurred "a few days" before appellant was arrested in this matter.

The prosecutor argued that this proposed testimony was not relevant. The prosecutor noted that appellant's proposed witnesses had not been present when G.A. was shot, and the prior incidents at appellant's residence were not related to G.A.'s shooting. The prosecutor further noted that, with the detective, appellant had denied knowing why he had shot G.A. The prosecutor contended that appellant had "essentially" rejected any suggestion that he had shot G.A. because of these prior incidents. The prosecutor asserted that, if appellant wanted to raise a heat of passion defense, he needed to testify to establish his state of mind.

Appellant's defense counsel responded that, during appellant's interview, he had provided vague answers that suggested he may have shot G.A. because of these prior incidents. The defense wanted to explain to the jury the background of these prior incidents. According to defense counsel, the proposed testimony was relevant to show appellant's "motivation" for shooting G.A. and that this was not "a random shooting."

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[9] During the offer of proof, appellant's trial counsel referred to appellant's brother-in-law variously as "Mark Lajarda" and "Marco Lajardo, Sr." It appears that defense counsel was referring to Guajardo.

The trial court noted that it would not allow any witnesses to speculate why appellant had shot G.A. The court asked if defense counsel was trying to establish that these prior incidents had in fact occurred. Defense counsel agreed. The prosecutor countered that he was prepared to stipulate that these prior incidents had occurred. However, according to the prosecutor, no arrests had been made in these prior incidents and no perpetrators had been identified. The prosecutor expressed concern that the defense would use this proposed testimony to suggest that G.A. was responsible for the prior incidents when nothing showed his connection. As such, according to the prosecutor, this proposed evidence violated Evidence Code section 352.

The trial court determined that, based on appellant's interview with the detective, the evidence showed it was "undisputed" that appellant's house had been fired upon. According to the court, the proposed testimony from these two witnesses would involve an undue consumption of time and it could confuse the issues because it did not "add anything." The court ruled that the defense could call these witnesses to testify about appellant's character for nonviolence. However, based on Evidence Code section 352, these witnesses could not testify about the prior shooting or firebombing of appellant's house.[10]

B. The standard of review.

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) Under this standard, we will not disturb the trial court's decision on appeal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

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10 The defense rested without calling any witnesses. The record suggests that the defense did not call appellant's sister or brother-in-law to testify because the prosecutor was prepared to cross-examine them regarding two specific incidents involving appellant in which he had displayed a character for violence. Defense counsel conferred with appellant before resting.

miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124–1125; see *People v. Williams, supra,* 17 Cal.4th at p. 162 [abuse of discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)

C. Analysis.

Appellant contends that this proposed testimony about the prior shooting and firebombing at his residence was necessary for the jury to understand whether voluntary manslaughter applied. He argues that the trial court abused its discretion in limiting this evidence. We disagree.

Relevant evidence is defined as having a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court may exclude otherwise admissible evidence if its probative value is substantially outweighed by its prejudicial effect; that is, if its admission would result in the undue consumption of time, a danger of undue prejudice, confusion about the issues or the danger of misleading the jury. (Evid. Code, § 352.) "Cumulative evidence may be excluded on this basis. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 439.)

In this matter, the trial court did not explain how it concluded that the probative value of this proposed testimony was outweighed by its prejudicial impact. The court, however, was not required to make such a record. (*People v. Catlin* (2001) 26 Cal.4th 81, 122; *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) In any event, it is clear that the court considered the parties' arguments and weighed this proposed testimony against the already presented trial evidence.

Based on defense counsel's representations, we cannot state that the court abused its discretion. During his offer of proof, defense counsel had mentioned that this proposed evidence could show "motivation" and explain why G.A.'s shooting was not random. However, the trial court confirmed with defense counsel that the purpose of this

testimony was to establish that the prior incidents had in fact occurred at appellant's residence. Defense counsel agreed with the court's understanding.

When the court made its ruling, it was undisputed that these prior incidents had transpired. Appellant's interview with the detective, which had been played to the jury prior to the court's ruling, had established that these prior events had taken place. Based on his exchanges with the detective, it is clear that appellant had agreed that these incidents had occurred at his residence. Moreover, at no time did the prosecutor dispute the existence of these prior events. To the contrary, the prosecutor was willing to stipulate that a prior shooting and firebombing had occurred at appellant's residence. It does not appear, however, that the defense accepted this offer.[11] In any event, when the court made its ruling, both the trial evidence and the various statements from counsel made it clear that these events had occurred.

Further, the defense never indicated that appellant was present when these prior incidents occurred at his residence. The defense also did not state that its two proposed witnesses would discuss how these events may have impacted appellant or caused him to shoot G.A. Defense counsel admitted that neither of appellant's two proposed witnesses saw the people responsible for the prior events that had occurred at appellant's residence.

The prosecutor commented that, based on police reports, no arrests had been made in these prior incidents, and no perpetrators had been identified. G.A.'s trial testimony had demonstrated that he did not know appellant and he did not understand why he had been shot. Prior to the court's ruling, the trial evidence had overwhelmingly suggested

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[11] During closing argument, the prosecutor did not dispute that someone had fired a weapon at appellant's residence prior to G.A.'s shooting. To the contrary, the prosecutor asserted that, under the circumstances, an ordinary person would not retaliate and shoot someone. According to the prosecutor, attempted voluntary manslaughter was not an appropriate verdict. The prosecutor relied on appellant's answers to the detective to argue that appellant did not shoot G.A. in anger.

that G.A.'s shooting had been a random act of violence. Nothing reasonably linked the prior incidents at appellant's house with G.A.'s shooting.

During his interview with the detective, appellant was vague about why he had fired his revolver at G.A. He denied knowing G.A. and said "I don't know" when asked if he had seen G.A. before. When asked if he shot G.A. because appellant might have thought he was the one who firebombed his residence, appellant answered, "Dunno. Maybe. I don't know." Appellant's answers to the detective belied any reasonable suggestion that he had shot G.A. in anger or in retaliation for the prior incidents that had occurred at his residence.

Based on this record, appellant's proposed testimony appeared cumulative. This evidence involved facts which were not disputed, and the prosecutor offered to stipulate that these prior events had occurred. As such, the trial court's evidentiary ruling was neither arbitrary, capricious nor patently absurd. (See *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124–1125.) Thus, the court's ruling did not fall outside the bounds of reason under applicable law and relevant facts. (See *People v. Williams, supra,* 17 Cal.4th at p. 162.) Accordingly, the court did not abuse its discretion and this claim fails. (See *People v. Weaver, supra,* 26 Cal.4th at p. 933.)

VI. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's *Marsden* Motion.

Appellant asserts that the trial court abused its discretion by denying his *Marsden* motion. He contends his judgment should be reversed.

A. Background.

1. Appellant's mother submits a letter to the trial court.

Following appellant's prior appeal, both he and his mother were informed by his appellate attorney that they should seek new trial counsel. According to the appellate attorney, appellant had received ineffective trial assistance. In a letter dated October 31,

2016 (about two weeks prior to appellant's *Marsden* hearing) appellant's mother asked the trial court to appoint a new attorney for her son.

In her letter, appellant's mother stated that her son's trial attorney did not have appellant's best interest in mind. According to appellant's mother, his trial counsel had failed to object to the erroneous jury instruction regarding section 12022.55, and he "coaxed" appellant into waiving his right to appeal. Appellant's mother stated that "our trust" in appellant's trial counsel "has been broken and our attorney-client relationship is not salvageable."

2. The *Marsden* hearing.

After this matter was remanded for further proceedings, appellant filed a motion pursuant to *Marsden, supra,* 2 Cal.3d 118. On November 14, 2016, the trial court conducted a confidential hearing. The court asked appellant to explain the situation. Appellant answered, "Well, I was requesting a new attorney because last time I feel [*sic*] he didn't represent me right. I feel he has something against me. So I can't really communicate that well with him. So I wanted to get the Public Defender." Appellant's trial counsel explained to the court that he had been appointed to represent appellant after the Public Defender's office had declared a conflict.

The court asked appellant to explain what his counsel had not done. Appellant said, "I feel he hasn't worked with me that good on my case. He hasn't really been trying to help me out filing any motions. I feel he has something towards me that he's not working with me."

The court asked appellant to explain the type of motion his counsel should file. Appellant answered, "Well, I don't know about my motion, but I just feel he wants something against me that he doesn't really want to help me out or anything."

In response, appellant's counsel said he did not have "anything against" appellant, and he had obtained a "relatively good result" after the first trial. Defense counsel

explained that he had argued the case "the best that I knew how" to show that appellant was not guilty of attempted murder. The defense had called a gang expert, whom the jury had not found persuasive. According to counsel, however, the defense was successful "in fighting down a conviction for attempted murder with a gang allegation, which would have been a mandatory [life without parole] sentence, if I'm not mistaken."

Defense counsel noted that appellant's case had been sent back on appeal because of errors during the instructional phase, which did not go to the issue that appellant was raising. Defense counsel said he did not have "anything against relitigating this case" and he held "nothing personally against" appellant. He said he had done his best during the first trial, and he would do that again.

The court asked appellant if he had anything further. Appellant answered, "No, your Honor." The court found no grounds to relieve appellant's counsel. The court stated that defense counsel "hasn't done anything he should have done." The court noted that counsel did "a relatively good job at trial" and "it could have been a lot worse."

B. The standard of review.

The denial of a *Marsden* motion is reviewed for an abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) To establish an abuse of discretion, the defendant must show that his or her right to assistance of counsel was substantially impaired. (*Ibid.*) The record must clearly show that the appointed counsel is not providing adequate representation or that the defendant and counsel have become embroiled in an irreconcilable conflict so that ineffective representation will likely occur. (*Ibid.*)

C. Analysis.

Appellant contends that his trial counsel was ineffective during the first trial because he failed to object to the jury instruction which caused the remand and he permitted an improper waiver of appellate rights. He further asserts that it appears the trial court did not read either his mother's letter or this court's prior opinion. He notes his

Marsden hearing was "brief and perfunctory." He claims that, had the court listened to him and "took the time to explain the process carefully," a second trial could have been avoided, at least in part, on grounds of double jeopardy because a new attorney would have prepared appropriate motions. Appellant's assertions are unpersuasive.

In conducting a *Marsden* hearing, the trial court must ascertain the nature of the defendant's allegations and decide whether the allegations have sufficient substance to warrant replacement of defense counsel. The trial court must give the defendant an appropriate opportunity to set forth the complaints regarding counsel's representation and allow counsel to respond. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320.) A trial court should grant a *Marsden* motion only when the defendant has made " ' "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." ' [Citation.]" (*People v. Streeter, supra,* 54 Cal.4th at p. 230.) A defendant's frustration with his counsel is not sufficient to order substitution of counsel. (*Id.* at p. 231.)

In this matter, neither appellant's comments nor his counsel's answers to the court established or even suggested that inadequate representation had occurred, or that an irreconcilable conflict existed. The court asked appellant to explain what he believed his counsel should have done. Appellant initially stated that counsel had not helped him file any motions, but he then admitted that he did not know about a motion. Appellant said that he felt his counsel "wants something against me" and his counsel "doesn't really want to help me out or anything." The trial court gave defense counsel an opportunity to respond. Counsel made it clear that he had done his best during the first trial, and he was prepared to do the same during the second trial. When given another opportunity to explain the situation, appellant did not provide additional information and he did not dispute his counsel's statements.

Although appellant expressed some frustration, that is insufficient to substitute counsel. (*People v. Streeter, supra,* 54 Cal.4th at p. 231.) Likewise, substitution is not warranted if a defendant expresses a lack of trust with his attorney or an inability to get along with him or her. (*People v. Clark* (2011) 52 Cal.4th 856, 918; see *People v. Silva* (1988) 45 Cal.3d 604, 622 [superficial complaints about "the way in which one relates with his attorney [do] not sufficiently establish incompetence. Defendant was required to show more"].) The trial court afforded appellant ample opportunity to set forth his complaints regarding counsel's representation, and after hearing those complaints, the trial court allowed counsel to respond. "The trial court was not required to do more." (*People v. Alfaro, supra,* 41 Cal.4th at p. 1320.)

We reject appellant's claim that the trial court should have substituted his trial counsel based on his mother's letter. This unsworn letter represented inadmissible hearsay evidence. (Evid. Code, § 1200, subds. (a) & (b).) We cannot state that the court abused its discretion in failing to order a substitution of counsel based on its contents. Instead, the court gave appellant an opportunity to express his concerns. At no time did appellant refer to his mother's letter or provide examples reasonably suggesting that his trial counsel was providing inadequate representation.

Finally, contrary to appellant's suggestion, our prior opinion does not set forth grounds upon which the trial court should have granted appellant's *Marsden* motion and appointed new counsel. Our prior opinion did not hold or even suggest that trial counsel may have rendered ineffective assistance during the first trial. To the contrary, we concluded that the trial court had "failed to instruct the jury regarding the elements necessary to find true the special allegation under section 12022.55." (*People v. Fierro, supra,* F068387.) We also determined that, based on the limited record, we had no way of knowing whether a knowing and intelligent appellate waiver had occurred. The record did not contain a written waiver form, and we had no way to determine what, if anything,

appellant's trial counsel said to him. While a purported waiver occurred, we could not say that the waiver was knowing and intelligent. (*People v. Fierro, supra*, F068387.)

Based on this record, appellant has failed to show that his right to assistance of counsel was substantially impaired. He did not establish inadequate representation or that he was embroiled in such an irreconcilable conflict that ineffective representation would likely result. As such, the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124–1125.) The court's ruling was not outside the bounds of reason under applicable law and relevant facts. (See *People v. Williams, supra,* 17 Cal.4th at p. 162.) Thus, the court did not abuse its discretion in denying appellant's *Marsden* motion. (See *People v. Streeter, supra,* 54 Cal.4th at p. 230.) Accordingly, this claim fails.

VII. Appellant's Trial Counsel Did Not Render Ineffective Assistance.

In both his petition for a writ of habeas corpus and his direct appeal, appellant contends that his trial counsel was repeatedly incompetent throughout his second trial. He seeks reversal of his judgment.

A. Background.

Appellant attached three declarations to his petition for a writ of habeas corpus.

1. The declaration from appellant.

In his own declaration, appellant states it was his "opinion and observation" that his trial counsel, who represented him at both trials, "did not represent me effectively." According to appellant, once his matter was remanded following his successful appeal, his trial counsel told him he "would be lucky" if he did not get life without parole. Defense counsel said it was a mistake to come back to the superior court. At a later court date, appellant asked whether defense counsel cared if appellant went back to prison.

According to appellant, defense counsel answered, " 'I don't care if you go back to prison or not.' " Counsel then said, " 'Well, you are going back to prison.' "

2. The declaration from appellant's mother.

Appellant's mother submitted a declaration which states that, during a hearing prior to the second trial, she spoke with appellant's defense counsel. According to the mother, defense counsel said that "it was not a good idea" for appellant to go through the second trial "because he could be facing 25 years to life in prison." Defense counsel stated that whoever helped appellant win his appeal " 'made a big mistake.' "

3. The declaration from the appellate attorney.

The appellate attorney submitted a declaration in support of appellant's petition. According to the appellate attorney, he attempted to contact trial counsel to obtain details about the waiver of appellate rights. Trial counsel, however, "was uncooperative and did not answer my questions." The appellate attorney also states that, following the successful appeal, he advised appellant to seek new trial counsel if a retrial occurred because defense counsel "had not represented [appellant] well in his first trial."

Finally, the appellate attorney states that he found information on the Internet regarding the lethality of firearms based on their respective calibers. Appellant argues in his opening brief that this data shows that lower caliber rounds (such as a .22-caliber bullet) fail to incapacitate a victim "roughly double that of higher caliber rounds." The appellate attorney also cites articles in his declaration regarding how the Federal Bureau of Investigation and the National Research Council, among other agencies, have discontinued gunshot residue testing.

B. The standard of review.

We have already set forth the standard of review for ineffective assistance of counsel. On direct appeal, a defendant must establish both (1) that counsel's performance fell below an objective standard of reasonable competence and (2) that he

was thereby prejudiced. (*Strickland, supra,* 466 U.S. 668, 687; *People v. Lucas, supra,* 12 Cal.4th at p. 436.) Likewise, in a petition for habeas corpus, the petitioner must prove facts by a preponderance of the evidence either (1) that, because of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing or (2) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (*In re Visciotti, supra,* 14 Cal.4th at pp. 351–352.)

C. Analysis.

In a series of related and overlapping arguments, appellant maintains that his trial counsel rendered ineffective assistance throughout the entire second trial. He notes that this trial was very short, and his counsel only cross-examined one of the nine prosecution witnesses. He claims that, without his counsel's ineffective assistance, it is reasonably probable he would not have been convicted of attempted murder. We have already addressed some of his claims of ineffective assistance. We review his remaining assertions.

1. Participation in "vindictive punishment" because appellant exercised his right to appeal.

Appellant contends that his trial counsel in "actuality or appearance" participated in the prosecution's vindictiveness against him. As set forth in the declarations from appellant and his mother, they note that defense counsel believed it was a "mistake" to win the appeal and return to the trial court. He argues his trial counsel was complicit in the prosecution's (and, by implication, the trial court's) efforts to punish him for exercising his right to appeal. He argues reversal is required. We disagree.

We have already determined that a vindictive prosecution did not occur. Neither the appellate record nor appellant's petition establish that appellant's trial counsel participated in a vindictive prosecution. Appellant has not demonstrated that his counsel's performance fell below an objective standard of reasonable competence. (See

Strickland, supra, 466 U.S. at p. 687.) Appellant has not proved by a preponderance of the evidence facts that establish a basis for relief on habeas corpus. (See *In re Visciotti, supra,* 14 Cal.4th at p. 351.) Accordingly, ineffective assistance of counsel has not been shown in this regard and this claim fails.

2. The failure to file a motion or argue that retrial was barred by principles of double jeopardy.

Appellant contends that his trial counsel was ineffective because he made no effort to bar retrial based on principles of double jeopardy. However, appellant's argument is meritless. We have already determined that double jeopardy did not bar retrial in this matter. A defense attorney is not required to make futile motions or to engage in " 'idle acts to appear competent.' " (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024.) Thus, appellant does not establish ineffective assistance of counsel, and we reject this claim.

3. Closing argument.

During closing argument, appellant's trial counsel conceded that appellant committed an assault with a firearm, and he acknowledged that appellant's actions were deplorable. However, he asserted that appellant must have fired at G.A. to discourage any more shootings or firebombings at his house. Defense counsel argued that appellant must have believed G.A. was involved in the prior incidents at appellant's home. He emphasized that appellant only fired a small caliber gun one time, and he could have fired his weapon up to five more times but did not do so. According to defense counsel the evidence did not demonstrate appellant's intent to kill. Later, counsel argued that, if the jury did find an intent to kill, then the appropriate crime was attempted voluntary manslaughter.

In raising this claim, appellant asserts that his trial counsel incompetently undermined any chance for a conviction of attempted voluntary manslaughter. He

contends that his trial counsel's closing argument encouraged the jury to find that he had deliberately and intentionally fired at G.A. Instead of arguing that appellant fired while in the heat of passion, his counsel asserted that appellant fired to discourage more shootings at his residence. He argues that his counsel's arguments "effectively conceded that appellant acted deliberately and not in the heat of passion, as required for attempted voluntary manslaughter." Appellant fails to establish ineffective assistance of counsel.

A trial attorney's decision regarding how to argue to the jury is inherently tactical, and judicial review of a defense attorney's summation is highly deferential. (*Yarborough v. Gentry* (2003) 540 U.S. 1, 6; *People v. Freeman* (1994) 8 Cal.4th 450, 498.) Concessions in closing argument do not constitute ineffective assistance when the incriminating evidence is strong, but defense counsel offers some other choice in the defendant's favor. (*People v. Hart* (1999) 20 Cal.4th 546, 631.) "Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense. [Citation.]" (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.)

Here, the jury rejected the allegation that appellant acted with premeditation and deliberation when he shot G.A. The jurors' decision strongly suggests that defense counsel's closing summation favorably influenced them. In addition, defense counsel explained how the facts could be interpreted to negate a finding that appellant held an intent to kill. Defense counsel also reminded the jury that it could convict appellant of attempted voluntary manslaughter as a lesser alternative to the charge of attempted murder. On at least two occasions, defense counsel asked the jury to review appellant's interview with the detective. Counsel asked the jury to examine appellant's demeanor during that interview.

During closing argument, appellant's trial counsel did not expressly or even impliedly concede appellant's guilt. To the contrary, the incriminating evidence against appellant was strong but his counsel offered other choices in his favor. By acknowledging the problems with appellant's behavior, his counsel "might have built credibility with the jury and persuaded it to focus on the relevant issues in the case." (*Yarborough v. Gentry, supra,* 540 U.S. at p. 9.) Although appellant's trial counsel could have argued in a manner appellant now suggests on appeal, it is not our role to determine if different approaches were available, but, rather, whether the record discloses that trial counsel had no rational tactical reason for the approach he took. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Based on this record, we cannot state that appellant's trial counsel had no rational tactical reason for the approach he took during closing argument. Appellant has not demonstrated that his counsel's performance fell below an objective standard of reasonable competence. (See *Strickland, supra,* 466 U.S. at p. 687.) Appellant has not proved by a preponderance of the evidence facts that establish a basis for relief on habeas corpus. (See *In re Visciotti, supra,* 14 Cal.4th at p. 351.) Accordingly, ineffective assistance of counsel has not been shown and this claim fails.

4. The failure to object to gang evidence.

During trial, the jury viewed appellant's interview with the detective. During the interview, appellant admitted firing one shot at G.A. using the gun recovered from his vehicle. Appellant told the detective that he did not know why he had fired at G.A. During the interview, the detective asked if appellant associated with Sureños, which appellant denied. He admitted associating with "Northerners." The detective asked, "did [G.A.] just fucking … mad dog you or did he call a—some fucking derogatory name? Buster, something like that, trying to piss you off a little bit, cause you to react in the way you did?" Appellant said he did not know why he shot G.A.

In raising this claim, appellant argues that competent defense counsel would have sought to exclude the brief gang admissions contained in his interview. He notes that, while his first trial involved gang allegations, gang allegations were not involved in his second trial. He asserts the gang evidence was highly prejudicial and it could have easily swayed the jury against him. We disagree. We can dispose of this claim due to a lack of prejudice.[12]

Other than a brief and passing mention of a few isolated gang terms, the jury did not hear any evidence about gangs or gang activity. Nothing established or even reasonably suggested that appellant had done prior bad acts as a gang member. We reject appellant's assertions that this fleeting mention about gangs could have inflamed the jury's passions against him.

Based on this record, there is no reasonable probability that redacting the brief mention of certain terms, such as Norteños or Northerners, would have resulted in a more favorable outcome for appellant. (See *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217–218.) Appellant has not established that his counsel's performance undermined the proper function of the adversarial process. (See *In re Visciotti, supra,* 14 Cal.4th at p. 352.) Accordingly, appellant has not established prejudice on either direct appeal or in his petition, and this claim fails. (See *Strickland*, *supra*, 466 U.S. at p. 687.)

5. The failure to impeach G.A.'s testimony.

Prior to trial, the prosecutor sought to exclude certain evidence regarding the victim in this matter, G.A. The prosecutor disclosed that, in 2003, G.A. had been

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[12] Respondent argues that, in a footnote associated with this claim, appellant cited improper extra-record material. Respondent asks us to strike appellant's reply brief or disregard the extra-record reference. The disputed material involves a *Fresno Bee* article about gang murders. We agree with respondent that it is not appropriate to rely on the newspaper article appearing in appellant's reply brief on page 27 in footnote 2. We will disregard that information. (Cal. Rules of Court, rule 8.204(e)(2)(C).) However, we deny respondent's request to strike or disregard appellant's remaining reply brief.

convicted of a lewd or lascivious act involving a child in violation of section 288, subdivision (a). The prosecutor asserted that this evidence was too remote in time, and it was not relevant for impeachment because G.A. was randomly shot without provocation or even communication with appellant. Appellant's trial counsel informed the court that he did not intend to cross-examine G.A. about this prior conviction.

In addition, the prosecutor disclosed that, based on medical records, G.A. had been under the influence of "certain narcotics" when appellant shot him. The prosecutor moved to redact that information from the medical records, arguing it was not relevant based on the facts of this shooting. Appellant's trial counsel indicated he did not oppose redaction.

In raising this claim, appellant argues that G.A.'s credibility should have been impeached. He contends that G.A.'s prior conviction would have shown his moral depravity. He asserts that the presence of narcotics in G.A.'s system during the incident would have raised questions about his ability to recall what happened. Appellant argues that no competent defense attorney would have permitted G.A. "to testify unimpeached and with full credibility." We can quickly dispose of these assertions.

As an initial matter, a defense attorney's failure to impeach a witness is usually a tactical decision and seldom establishes incompetence. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1140.) The decision whether a witness should be more rigorously cross-examined is normally left to counsel's discretion and rarely establishes inadequate representation. (*People v. Williams* (1997) 16 Cal.4th 153, 216.)

Here, the decision to not attack G.A.'s credibility appeared to be tactical in nature. As such, appellant does not demonstrate that his counsel's performance fell below an objective standard of reasonable competence. (See *Strickland, supra,* 466 U.S. at p. 687.) Appellant has not proved by a preponderance of the evidence facts that establish a basis

for relief on habeas corpus. (See *In re Visciotti, supra,* 14 Cal.4th at p. 351.) In any event, appellant also fails to establish prejudice.

It was undisputed that appellant shot G.A. in his chest. G.A. did not see his assailant. He was transported to the hospital and underwent surgery. He was hospitalized for five days. The bullet was not removed, and it remained lodged in his body. In court, G.A. denied knowing or recognizing appellant.

Based on this record, there is no reasonable probability that impeaching G.A.'s credibility would have resulted in a more favorable outcome for appellant. (See *People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) Appellant has not established that his counsel's performance undermined the proper function of the adversarial process. (See *In re Visciotti, supra,* 14 Cal.4th at p. 352.) Accordingly, appellant has not established prejudice on either direct appeal or in his petition, and this claim fails. (See *Strickland, supra,* 466 U.S. at p. 687.)

6. The failure to cross-examine police witnesses or produce a defense expert.

During trial, appellant's counsel cross-examined only one witness, a police officer who investigated this shooting. During cross-examination, the officer explained that he carried a .40-caliber handgun. The officer admitted that he was unaware of any police agency carrying a .22-caliber firearm. The officer explained that he carried a .9-millimeter handgun when off duty. Counsel asked if a .22-caliber firearm was "ideal" for self-defense, and the officer said, "it could be." The officer agreed that a .40-caliber bullet was almost twice the size of a .22-caliber bullet. The officer agreed that not all officer-involved shootings with a .40-caliber weapon resulted in death.

On redirect-examination, the officer explained that a .22-caliber bullet can cause fatal damage if it penetrates a person's body. Another officer also later testified that a .22-caliber firearm can be lethal.

In raising this claim, appellant contends that his trial counsel failed to adequately develop a defense. Appellant notes that his counsel failed to call an expert witness to discuss the "stopping power" of various firearm calibers. Based on a declaration from appellate counsel, appellant cites information from the Internet for the proposition that lower caliber rounds (such as a .22-caliber bullet) "have a failure-to-incapacitate rate that is roughly double that of higher caliber rounds." Appellant asserts that his trial counsel's failure to develop this evidence was prejudicial. We disagree. We can dispose of this claim due to a lack of prejudice.

The disputed issue for the jury to consider in this matter was whether appellant held an intent to kill. The jury heard evidence that a .22-caliber bullet, like the one which appellant fired, is considerably smaller in size than a .40-caliber firearm, such as the one carried by a testifying police officer. The jurors learned that a .22-caliber firearm can be lethal, but they also learned that even a .40-caliber firearm does not always cause a fatality.

During closing argument, defense counsel asserted that attempted murder did not occur just because appellant fired a gun at G.A. Counsel noted that appellant had fired a "low-caliber" revolver, which had held five more bullets. Counsel emphasized that his client could have fired more shots at G.A., but he did not do so. Counsel reminded the jury about the officer's testimony that his police-issued firearm was .40-caliber, which was much bigger than the firearm appellant had used. A shooting with a .40-caliber firearm, however, was not always fatal. Defense counsel reminded the jurors that, if they believed a guilty verdict was warranted, then attempted voluntary manslaughter was more appropriate than attempted murder.

Based on the verdict rendered, it is apparent that the jury found an intent to kill. The evidence amply supports the jury's verdict. Regardless of its caliber, appellant fired a weapon at G.A. which was capable of inflicting a fatal wound. It is not reasonably

probable that, had the defense produced more evidence on the reduced "stopping power" of a .22-caliber firearm, the result would have been better for appellant.

Based on this record, there is no reasonable probability that additional evidence regarding the difference between .22-caliber firearms and those with greater stopping power would have resulted in a more favorable outcome for appellant. (See *People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) Appellant has not established that his counsel's performance undermined the proper function of the adversarial process. (See *In re Visciotti, supra,* 14 Cal.4th at p. 352.) Accordingly, appellant has not established prejudice on either direct appeal or in his petition, and this claim fails. (See *Strickland, supra,* 466 U.S. at p. 687.)

7. The failure to cross-examine the prosecution's expert on gunshot residue.

During trial, the prosecution elicited testimony about gunshot residue from two witnesses. Their testimony established that law enforcement took gunshot residue samples from inside appellant's vehicle. The samples indicated that appellant had fired a gun from inside his vehicle by the driver's front door. Appellant's trial counsel did not cross-examine these two witnesses.

In the present claim, appellant argues that the prosecution appears to have used gunshot residue evidence to bolster its theory that appellant held an intent to kill. He further contends that a reasonably competent defense attorney would have attacked the validity of gunshot residue testing. He cites various sources which call into question the scientific validity of gunshot residue testing. He claims his counsel's failure to cross-examine these witnesses was prejudicial. This claim is meritless based on a lack of prejudice.

Appellant admitted during his interview with the detective that he shot G.A. while driving his vehicle. He admitted that he used the gun which police recovered from his

vehicle. As such, there is no reasonable probability that a different outcome would have occurred if appellant's trial counsel had cross-examined the two witnesses regarding gunshot residue testing. (See *People v. Ledesma, supra*, 43 Cal.3d at pp. 217–218.) Appellant has not established that his counsel's performance undermined the proper function of the adversarial process. (See *In re Visciotti, supra,* 14 Cal.4th at p. 352.) Accordingly, appellant has not established prejudice on either direct appeal or in his petition, and this claim fails. (See *Strickland, supra*, 466 U.S. at p. 687.)

VIII. Cumulative Prejudice Did Not Occur.

Under the cumulative error doctrine, errors individually harmless may nevertheless have a cumulative prejudicial effect. (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) The issue is whether the defendant received a fair trial. (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.)

In two separate but related arguments, appellant raises cumulative prejudice. He claims that his second trial was fundamentally unfair. He contends that his trial counsel failed to develop "an overall strategy" and failed to present an effective defense. He notes that his second trial was short, and his counsel only cross-examined one of the nine prosecution witnesses. He argues his second trial should have never occurred, and his trial counsel presented a defense in the second trial that had no chance of winning. He maintains the second jury was given the "all-or-nothing choice" of convicting him of attempted murder or allowing him to walk away free. He asserts that the cumulative effect of his trial counsel's deficient performance requires reversal of his judgment. We disagree.

Appellant's assertions of cumulative prejudice are without merit because we have rejected all individual claims. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [cumulative prejudice argument rejected because each individual contention lacked merit or did not result in prejudice].) Moreover, the declarations accompanying appellant's

petition do not allege specific facts or details that establish ineffective assistance of counsel. Instead, they make conclusory assertions that appellant's counsel was ineffective. The lack of specificity discredits this evidence. (*In re Reno* (2012) 55 Cal.4th 428, 503.)

Appellant has not proven facts by a preponderance of the evidence that establish a basis for relief. (See *In re Visciotti, supra,* 14 Cal.4th at p. 351.) Appellant has failed to establish that, as a result of his counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing. (*Ibid.*) Appellant has also failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (*Id.* at p. 352.) Finally, appellant has failed to show that, as a result of counsel's alleged failures, his trial was unreliable or fundamentally unfair. (*Ibid.*) We cannot state that counsel's conduct so undermined the proper functioning of the adversarial process that an unjust result occurred. (*Ibid.*) Accordingly, we reject appellant's claims of cumulative prejudice based on his counsel's alleged ineffective assistance of counsel.

IX. Remand Is Not Warranted For The Trial Court To Consider The Firearm Enhancement Under Senate Bill No. 620.

At the time of appellant's 2017 sentencing in this matter, the trial court was required to impose an additional prison sentence for the firearm enhancement found true under section 12022.53. (Former § 12022.53, subd. (d).) On October 11, 2017, however, the Governor approved Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended, in part, section 12022.53. Under the amendment, a trial court now has discretion to strike or dismiss this firearm enhancement. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)

Via supplemental briefing, the parties agree, as do we, that this amendment applies retroactively to appellant because his case is not yet final. (*People v. Woods* (2018) 19

Cal.App.5th 1080, 1090.) The parties, however, disagree whether remand is appropriate. Respondent asserts that a remand is unnecessary. According to respondent, the sentencing record establishes that the trial court would not have exercised its discretion to strike or dismiss the firearm enhancement. As such, remand would serve no purpose. We agree.

At sentencing in this matter, the trial court followed the recommendations of the probation department and imposed the upper term of nine years for the attempted murder conviction. The court found no factors in mitigation. For factors in aggravation, the court cited appellant's failure to complete probation and his failure to complete drug court. The court called appellant's actions "callous" and noted that "[t]his case dramatizes where our society has come to. You can't even travel on the roadway and be an innocent person without having the chance of getting shot for no reason at all. [Appellant] is so fortunate he's not here facing murder charges. An unbelievable, unprovoked act in this case."

Based on the court's comments, there is no reason to believe the trial court would have exercised its discretion to strike the firearm enhancement if it had such discretion. The court imposed the maximum possible sentence and expressed shock over appellant's actions. A remand for resentencing under these circumstances would be an idle act. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [denying remand after sentencing court indicated it would not have exercised its discretion to strike a Three Strikes prior even if it had believed it could have done so]; *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Gamble* (2008) 164 Cal.App.4th 891, 901 [if " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required' "].)

Based on the sentencing record, we can declare that there is "no reasonable possibility" the trial court would have exercised its sentencing discretion favorably for

appellant. As such, a remand would serve no purpose. Accordingly, we deny appellant's request for remand based on Senate Bill No. 620 (2017-2018 Reg. Sess.).

X. The Indeterminate Abstract Of Judgment Must Be Corrected.

Our independent review of the record has revealed clerical errors in the indeterminate abstract of judgment. In count 1, the jury convicted appellant of attempted murder (§§ 664/187, subd. (a)), finding true the special allegation that he personally and intentionally discharged a firearm causing great bodily injury in violation of section 12022.53, subdivision (d). At sentencing, the trial court imposed the upper term of nine years for the attempted murder, plus a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The indeterminate abstract of judgment, however, lists the firearm enhancement under section *12022.5*.

In addition, in count 2, the indeterminate abstract of judgment shows a stayed firearm enhancement also imposed pursuant to section 12022.5. This is erroneous because no such firearm enhancement was ever found true in the first trial.

An appellate court may correct clerical errors appearing in abstracts of judgment either on its own motion or upon application of the parties. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]" (*Ibid.*)

We will direct the trial court to correct the indeterminate abstract of judgment. The court shall strike any reference to firearm enhancements imposed in counts 1 and 2 pursuant to section 12022.5. Instead, the abstract shall reflect a firearm enhancement imposed in count 1 pursuant to section 12022.53, subdivision (d).

DISPOSITION

We direct the trial court to amend the indeterminate abstract of judgment and remove any reference to firearm enhancements imposed in counts 1 and 2 under section

12022.5. The abstract shall also be modified to reflect a firearm enhancement imposed in count 1 pursuant to section 12022.53, subdivision (d). The court shall forward a certified copy of the amended indeterminate abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed. The petition for a writ of habeas corpus is summarily denied.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

_____
FRANSON, J.